

Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (Part 1)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO S 6–24–1015 OF 2006
ABDUL MALIK ISHAK J
26 APRIL 2007

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Civil Procedure — Affidavits — Affidavit in reply — Defendant relied on affidavit in reply filed for another application — Affidavit in reply filed out of 14 days period — Whether ought to be considered by court —

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The defendant sold its property to the plaintiff by way of a sale and purchase agreement dated 22 March 2002. The plaintiff inspected the property before executing the sale and purchase agreement and took cognizance of the existence of twenty-two units of arcade shop lots on the ground floor and one open floor on the first floor and the whole roofing was intact. On 15 December 2002, the plaintiff paid the full purchase price of RM4,995,000 to the defendant. The defendant delivered vacant possession of the property to the plaintiff on 1 May 2003. According to the plaintiff, the defendant only delivered the outer shell of the property without the twenty-two units of arcade shop lots on the ground floor and without half of the first floor and without half of the roofing. It was averred that the plaintiff had to pay the sum of RM394,000 for the repair works. According to the plaintiff, it had suffered the loss of rentals for three and the half months commencing from 1 May 2003 to 19 August 2003 computed at RM238,000. The defendant relied on an affidavit in reply in encl 5 which was in support of the defendant's application to strike out the plaintiff's originating summons in enclosure 1 pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The defendant stressed that it should be allowed to rely on an affidavit in reply in encl 5 in order to rebut the plaintiff's affidavit in encl 2.

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Held:

- (1) There was a delay in filing encl 5 and there was no application to extend time. Therefore encl 5 must not be considered by this court in adjudicating encl 1. Any affidavit in reply filed out of the 14 days period must be precluded from being considered by this court. The affidavit in reply in encl 5 was such an affidavit and a strict interpretation of O 32 r 13(2)(b) of the RHC must be adopted. In reality, encl 5 was not an affidavit in reply to encl 2. There was no affidavit in reply to encl 2 (see para 2); *Leow Teow Beng v Liew Chun Wah & Ors* [2000] 2 MLJ 238; and *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 followed.

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- A (2) All the averments in the affidavit in support in encl 2 stood un rebutted. They must be deemed to be admitted (see para 7); *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; and *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281 followed.

B [Bahasa Malaysia summary]

- C Defendan telah menjual hartanahnya kepada plaintif melalui satu perjanjian jual beli bertarikh 22 Mac 2002. Plaintif memeriksa hartanah tersebut sebelum menandatangani perjanjian jual beli dan mengambil perhatian kepada wujudnya 22 unit-unit arked lot kedai di tingkat bawah dan satu kawasan lapang di tingkat satu dan keseluruhan bumbung masih utuh. Pada 15 Disember 2002, plaintif membayar sepenuhnya harga belian sebanyak RM4,995,000 kepada defendan. Defendan menyerahkan milikan kosong hartanah tersebut kepada plaintif pada 1 Mei 2003. Menurut plaintif, defendan hanya menyerahkan dinding luar hartanah tersebut tanpa 22 unit-unit arked lot kedai di tingkat bawah dan tanpa setengah
- D daripada tingkat satu dan tanpa separuh daripada bumbung. Plaintif mengatakan bahawa ia terpaksa membayar jumlah wang sebanyak RM394,000 untuk kerja-kerja pembaikan. Menurut plaintif, ia telah kehilangan sewa untuk tiga setengah bulan bermula dari 1 Mei 2003 sehingga 19 Ogos 2003 yang berjumlah RM238,000. Defendan bergantung pada affidavit jawapannya di lampiran 5 untuk menyokong
- E permohonan defendan untuk membatalkan saman pemula plaintif di lampiran 1 menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan menegaskan bahawa ia sepatutnya dibenarkan untuk bergantung atas affidavit jawapannya di lampiran 5 untuk mematahkan affidavit plaintif di lampiran 2.

F **Diputuskan:**

- G (1) Terdapat kelewatan dalam memfailkan lampiran 5 dan tiada permohonan untuk melanjutkan masa. Dengan itu lampiran 5 tidak seharusnya dipertimbangkan oleh mahkamah ini dalam mengadili lampiran 1. Sebarang affidavit jawapan yang difailkan luar daripada tempoh 14 hari mesti diketepikan daripada dipertimbangkan oleh mahkamah ini. Affidavit jawapan di lampiran 5 adalah satu affidavit sebegini dan satu pentafsiran tegas A 32 k 13(2)(b) KMT harus di pakai. Sebenarnya, lampiran 5 bukannya satu affidavit jawapan kepada lampiran 2. Tiada affidavit kepada lampiran 2 (lihat perenggan 2); *Leow Teow Beng v Liew Chun Wah & Ors* [2000] 2 MLJ 238; and *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 diikuti.
- H (2) Segala pengataan-pengataan di dalam affidavit sokongan di lampiran 2 tidak dipatahkan. Mereka harus dianggap sebagai pengakuan (lihat perenggan 7); *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; and *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281 diikuti.]
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Notes

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 319–330.

Cases referred to

Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara Taiping & Ors [1996] 4 MLJ 54 (refd) **B**

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (folld)

Alfred Dunhill Ltd v Sunaptic SA [1979] FSR 337 (refd)

Hau Eui Tiam v Phang Kui Fatt & 2 Ors [2000] 1 AMR 690 (refd)

KS Chua & Co v Chui Miang Chew & Ors [1995] 4 MLJ 436 (folld) **C**

Leow Teow Beng v Liew Chun Wah & Ors [2000] 2 MLJ 238 (folld)

Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281 (folld)

Perwira Affin Bank Bhd v Nasaruddin bin Abdul Jalil [1999] 5 MLJ 6 (refd)

Ravi all Suppiah v Timbalan Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 1 AMR 513 (refd)

Voon Mow Chen v Menteri Dalam Negeri & Anor [1993] 2 AMR 38: 2205 (refd) **D**

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 32 r 13(2)(b), O 41 r 1

Ashokvijay J Sanghrajka (TK Wong Tan & Associates) for the plaintiff.

N Balachandran (Balachandran) for the defendant. **E**

Abdul Malik Ishak J (now JCA):

THE ORIGINATING SUMMONS IN ENCL 1

[1] This was the plaintiff's application seeking for the following reliefs: **F**

1. Satu deklarasi bahawa hartanah yang di beli oleh Plaintiff di dalam Perjanjian Jual Beli bertarikh 22–3–2002 adalah 'A double storey pre war building in fair wear and tear currently housing twenty two (22) units of arcade shop lots in the ground floor and 1 open floor in the 1st Floor held under No Hakmilik 125, (formerly under CT 7509), Lot 143, Seksyen 33 Bandar of Kuala Lumpur, State of Wilayah Persekutuan and housing a postal address as No 47, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur measuring approximately 229.741 sq metres. **G**

2. Satu deklarasi bahawa Defendan dikehendaki dibawah Perjanjian Jual beli bertarikh 22 Mac 2002 memberi milikkan kosong hartanah tersebut seperti yang diperihal 'A double storey pre war building in fair wear and tear currently housing twenty two (22) units of arcade shop lots in the ground floor and 1 open floor in the 1st Floor held under No Hakmilik 125, (formerly under CT 7509), Lot 143, Seksyen 33 Bandar of Kuala Lumpur, State of Wilayah Persekutuan and housing a postal address as N 47, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur measuring approximately 229.741 sq metres. **H**

3. Gantirugi khas sebanyak RM394.000 sahaja. **I**

4. Gantirugi am yang akan ditaksirkan.

5. Faedah pada kadar 8% setahun atas jumlah RM394,000 sahaja dari tarikh saman ini sehingga penyelesaian penuh.

- A** 6. Faedah pada kadar 8% setahun atas jumlah gantirugi am yang akan ditaksirkan dari tarikh saman ini sehingga penyelesaian penuh.
7. Kos bagi tindakan ini.
8. Lain-lain perintah atau relif selanjutnya sepertimana Mahkamah yang Mulia ini fikirkan patut dan adil diberikan.
- B** It was supported by an affidavit affirmed by Raj Kumar Baria on 29 May 2006 as seen in encl 2. The affidavit in encl 2 was served onto the defendant's counsel on 13 June 2006. There was no affidavit in reply to encl 2.
- C** [2] The defendant relied on an affidavit in reply in encl 5 that was filed on 9 August 2006. But that affidavit in reply in encl 5 was in support of the defendant's application to strike out the plaintiff's originating summons in encl 1 pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The defendant stressed that it should be allowed to rely on an affidavit in reply in encl 5 in order to rebut the affidavit of Raj Kumar Baria in encl 2. I have this to say. Even if I were to consider encl 5, it must not be forgotten that there was a delay in filing encl 5 and there was no application to extend time. I ruled that encl 5 must not be considered by this court in adjudicating encl 1. Order 32 r 13(2)(b) of the RHC states as follows:
- D** (2) Save as otherwise provided in these rules —
- E** (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.
- So, any affidavit in reply filed out of the 14 days period must be precluded from being considered by this court. The affidavit in reply in encl 5 was such an affidavit and a strict interpretation of O 32 r 13(2)(b) of the RHC must be adopted
- F** (*Leow Teow Beng v Liew Chun Wah & Ors* [2000] 2 MLJ 238; and *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436). In reality, encl 5 was not an affidavit in reply to encl 2. As I said earlier, there was no affidavit in reply to encl 2.
- G** [3] Affidavits play a prominent role in our courts. It is a sworn statement and it can be used as evidence of the matters deposed thereto. Legal arguments should not be incorporated in an affidavit (*Alfred Dunhill Ltd v Sunaptic SA* [1979] FSR 337). It is ideal to note that every affidavit must be signed by the deponent and the jurat too must be completed and signed by the person before whom it is sworn. A jurat must be in compliance with Form 78 (see O 41 r 1 of RHC and place *Ravi all Suppiah v Timbalan Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 1 AMR 513). And a defective affidavit shall not be used in evidence (*Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 2 AMR 38: 2205; *Hau Euu Tiam v Phang Kui Fatt & 2 Ors* [2000] 1 AMR 690; and *Perwira Affin Bank Bhd v Nassarudin bin Abdul Jalil* [1999] 1 AMR 723). It must be emphasised that a deponent of an affidavit may only affirm an affidavit of facts of which he is able of his own knowledge to prove (*Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara Taiping & Ors* [1996] 4 MLJ 54). In this judgment, I only considered encls 1 and 2. Nothing else.
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THE FACTUAL MATRIX

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[4] The defendant sold its property to the plaintiff by way of a sale and purchase agreement dated 22.3.2002. The property which the plaintiff purchased was described in Part 3, of the First Schedule in the sale and purchase agreement as, 'A double storey pre-war building in fair wear and tear currently housing 22 units of arcade shop lots on the ground floor and one open floor on the first floor held under No Hakmilik 125 (formerly under CT 7509), Lot 143, seksyen 33 Bandar of Kuala Lumpur, State of Wilayah Persekutuan and bearing a postal address at No 47, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur measuring approximately 229,741 sq. metres.' The plaintiff inspected the property before executing the sale and purchase agreement and took cognizance of the existence of 22 units of arcade shop lots on the ground floor and one open floor on the first floor and the whole roofing was intact.

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[5] On 15 December 2002, the plaintiff paid the full purchase price of RM4,995,000 to the defendant. The defendant delivered vacant possession of the property to the plaintiff on 1 May 2003. According to the plaintiff, the defendant only delivered the outer shell of the property without the twenty-two (22) units of arcade shop lots on the ground floor and without half of the first floor and without half of the roofing. The plaintiff took a video recording of the state and condition of the property as at the date of delivery of vacant possession of the property on 1 May 2003. That video recording was reduced in photograph forms and these photographs were annexed collectively as exh 'RKB-2' to the affidavit in support in encl 2. The coloured photographs certainly speak louder than words. It was quite a sight to behold.

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[6] According to the plaintiff, contractors had to be engaged to re-instate the missing 22 units of arcade shop lots on the ground floor, the missing half of the first floor and the missing half of the roofing. It was averred that the plaintiff had to pay the sum of RM394,000 for the repair works to the contractors. The invoices and receipts were exhibited collectively as exh 'RKB-3' and they were annexed to the affidavit in reply in encl 2. It was also averred that as a result of the defendant's breaches of the sale and purchase agreement, the contractors were only able to complete the repair works sometime in the middle of August 2003. It was only on 19 August 2003 that the plaintiff was able to rent out the 22 units of arcade shop lots on the ground floor as well as the first floor of the property. According to the plaintiff, it had suffered the loss of rentals for three and the half months commencing from 1 May 2003 to 19 August 2003 computed at RM238,000 only.

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CONCLUSION

[7] All the averments in the affidavit in support in encl 2 stood un rebutted. They must be deemed to be admitted (*Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; and *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281).

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[8] Consequently, I gave an order in terms of encl 1 particularly prayers (1), (2), (3), (5) and (7) thereto. I too made an order that prayers (4) and (6) of encl 1 must

A be determined by the learned deputy registrar or the learned senior assistant registrar in due course. This was on 30 August 2006.

Order accordingly.

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Reported by Sally Kee

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